DEC 1980

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-348

H.A. ARTISTS & ASSOCIATES, INC.; S.T.E. REPRESENTATION LTD.; J. MICHAEL BLOOM, LTD.; DON BUCHWALD & ASSOCIATES, INC.; MARJE FIELDS, INC.; HENDERSON/HOGAN AGENCY INC.; OPPENHEIM-CHRISTIE ASSOCIATES LTD.; JOEL PITT LTD.; TALENT REPRESENTATIVES INC.; D.M.I. TALENT ASSOCIATES, LTD.; JEAN THOMAS AGENCY, INC.; BOB WATERS AGENCY, INC.; JACOBSON-WILDER INC.; WILLIAM D. CUNNINGHAM & ASSOCIATES, INC.; TRANUM ROBERTSON & HUGHES, INC.; MONTY SILVER AGENCY LTD.; BRET ADAMS, LIMITED; MICHAEL THOMAS AGENCY, INC.; LESTER LEWIS ASSOCIATES, INC.; LEAVERTON ASSOCIATES LTD.; JOE JORDAN TALENT AGENCY INC.; RAGLYN-SHAMSKY, LTD.; ANN WRIGHT REPRESENTATIVES INC.,

Petitioners,

against

ACTORS' EQUITY ASSOCIATION, an unincorporated association, and DONALD GRODY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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Questions Presented

The questions presented must be considered in light of major factual differences between *American Federation of Musicians* v. *Carroll,* 391 U.S. 99 (1968) *("Carroll"),* the authority followed by the Courts below, and this case. In *Carroll,* the defendant union did not have a collective bargaining agreement with the employers of the union's members and the booking agents, who obtained jobs for the union members, were not licensed as employment agencies under New York State law. In the present case, Actors' Equity Association ("Equity" or the "Union"), the defendant union, has collective bargaining agreements with the employers of its members which set forth the minimum wages the employers must pay union members, and the theatrical agents are licensed as employment agents.

The questions presented for review are:

1. Should the holding in *Carroll* that booking agents are members of a "labor group" and thus can be regulated with antitrust immunity by the union whose members they represent be confined to fact situations where the union does not have a collective bargaining agreement with the employers of its members?

2. Should *Carroll,* which primarily dealt with a union's fixing the prices charged to clients by orchestra leaders (who are themselves union members who compete with union members and who employ union members) be overruled to the extent that it holds that agents who are employed by union members are part of the union's "labor group"?

3. Should the holding in *Carroll* permit Equity to forbid licensed theatrical agents from charging commissions on scale or minimum jobs obtained for Equity members?

4. Should the holding in *Carroll* be extended to permit the Union, which prohibits its members from employing theatrical agents who are not franchised by the Union, to extract franchise fees from theatrical agents as payment for the right to be regulated and dominated by the Union?

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BRIEF FOR THE PETITIONERS

Opinions Below

The opinion of the Court of Appeals is reported at 622 F.2d 647 [J.A.[1] 332]. The opinion of the District Court is reported at 478 F.Supp. 496 (S.D.N.Y. 1979) (Motley, J.) [Pet. App. B1].

Jurisdiction

The judgment of the Court of Appeals was entered on May 23, 1980. The Petition for a Writ of Certiorari was filed on August 19, 1980 and was granted on November 17, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

Statutes Involved

1. Section 1 of the Sherman Act (15 U.S.C. § 1) provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared illegal . . ."

2. Section 2 of the Sherman Act (15 U.S.C. § 2) provides, in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

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[1] As used herein: "J.A." refers to the Joint Appendix, "R." refers to the Record, and "Pet. App." refers to the appendices annexed to the Petition for Certiorari.

3. Section 6 of the Clayton Act (15 U.S.C. § 17) provides, in pertinent part:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

4. Section 20 of the Clayton Act (15 U.S.C. § 15) [Pet. App. E1].

5. Sections 5-15 of the Norris-LaGuardia Act (29 U.S.C. §§ 105-115) [Pet. App. F1].

6. Sections 180, 183 and 185 of Article 11 ("Employment Agencies") of the General Business Law of the State of New York (McKinney 1968) [Pet. App. G1].

Statement of the Case

A. Introduction

Petitioners are theatrical agents (sometimes hereinafter referred to as "Agents")[2]. Equity is a union whose

[2] The National Association of Talent Representatives ("NATR") is a trade association of agents who represent actors in the legitimate theatre field and other fields including television and motion pictures. All the Agents are members of NATR, but not all NATR members

members include virtually all actors appearing in legitimate theatrical productions in the United States. Respondent, Donald Grody, was Executive Secretary of the Union.

This is an action for injunctive relief (only) under §16 of the Clayton Act (15 U.S.C. §26) alleging that the Union's conduct is violative of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2). The Agents claim that the Union's compulsory franchising system for theatrical agents which prohibits Union members from dealing with nonfranchised agents such as petitioners constitutes a price fix, an agreement not to compete, a group boycott of nonfranchised agents and monopolization in violation of the Sherman Act. The Union contends that theatrical agents are part of its labor group and therefore its regulation of agents is immune from the operation of the antitrust laws.

B. Statement of Facts

> "Actors' Equity has collective bargain agreements with most major theatrical producers in New York and elsewhere, with most off-Broadway producers, and with many other theatrical producers throughout the United States. The terms negotiated

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are plaintiffs. [J.A. 62]. Most of the Agents are small agencies employing no more than 2 or 3 agents. They represent very few "stars". [J.A. 76, 100]. Theatrical Artists Representative Associates ("TARA") is a trade association of agents working in the legitimate theatre field who compete with the Agents. TARA is the designated bargaining representative for all theatrical agents under the present Equity Agency Regulations, as it was under "Rule A", the Union's predecessor franchising system. [Pl. Ex. 71, R. 44 (p. 380), J.A. 209; Pl. Ex. 106, R. 43 (p. 162); J.A. 51-58; R. 43 (pp. 123, 236); J.A. 184-85]. TARA's members include the William Morris Agency ("William Morris"), and International Creative Management ("ICM"). William Morris and ICM are the two largest theatrical agencies. They employ approximately 200 agents each and represent "many stars". William Morris rarely obtains employment for its clients at scale or minimum wages. [R. 43 (pp. 230-235)]. The offices of William Morris serve as the offices and mailing address of TARA. [R. 43 (p. 237)].

with various producer groups are the minimum terms and conditions of employment. An actor is free to negotiate salary or terms more favorable than those prescribed in the collective bargaining agreement, but neither the actor nor the producer [nor the agent] is permitted to diminish the wages set forth in the relevant collective bargaining agreement.

Theatrical agents are independent contractors in the business of placing their actor clients in jobs with producers.[3] Theatrical agents receive commissions, based on a percentage of earnings of the client, only if they succeed in obtaining employment for their clients.

Theatrical agents who operate in New York City [including all petitioners] are required to be licensed as employment agencies and are regulated by the Department of Consumer Affairs of New York City pursuant to article 11 of the General Business Law of the State of New York, which sets the maximum commissions [10%] employment agencies may charge and has specific provisions[4] dealing with theatrical agents.

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[3] Theatrical agents also perform the following functions on behalf of their actor-clients: mailing resumes, pictures and tapes to producers in order to familiarize producers with an actor's ability; introducing actors to producers and casting directors; counselling actors involved in out of town productions and, at times, travelling to out of town productions; attending Broadway productions in which clients are appearing, and accompanying producers to view such productions; and counselling actors in all aspects of developing their careers. [J.A. 77-83, 91-95]. Theatrical agents incur the following expenses, none of which are reimbursable by their clients: travelling to out of town productions to view their clients perform; entertaining producers and casting directors in order to acquaint them with clients; entertaining clients; mailing "submissions" (resumes, biographical material, etc.) to producers; attending Broadway productions. [J.A. 79-83].

[4] *See* §§ 180, 183 and 185 [Pet. App. G].

As a matter of general industry practice, producers seek actors and actresses for their productions through agents. . . . [A]n actor without an agent does not have the same access to producers or the same opportunity to be seriously considered for a part as does an actor who has an agent." 478 F.Supp. at 497 [Pet. App. B2].

"At issue in this case is Equity's system of 'franchising' theatrical agents. Agents pay a fee and agree to abide by certain restrictions in return for certification as 'franchised' agents. Equity encourages agents to become franchised by forbidding its members to deal with unfranchised agents. Equity members who negotiate contracts using the services of unfranchised agents are subject to union discipline, including fines." 622 F.2d at 648 [J.A. 334].

"In order to enforce its rule that members deal only through franchised agents, Actors' Equity has advised members that they could be disciplined for dealing with nonfranchised agents. It was Actors' Equity's practice to send a letter to an actor dealing with a nonfranchised agent, warning the actor that he could be disciplined—a copy of the letter was also sent to the nonfranchised agent. In 1979, Actors' Equity began disciplinary proceedings against members who were dealing with nonfranchised agents [such as petitioners]—members who would not agree to cease dealing with nonfranchised agents were fined after hearings." 478 F.Supp. at 499 [Pet. App. B4].

"The most important of the restrictions placed upon franchised agents is the requirement that they renounce any right to take commissions on contracts under which an actor receives scale wages.

> Scale wages are set by a collective bargaining agreement between Equity and theatrical producers, to which the agents are not parties. To the extent that a contract includes provisions under which an actor will sometimes receive scale pay (as for rehearsal periods and 'chorus' employment) and sometimes more, the franchise regulations deny the agent any commission on the scale portions of the contract. Franchised agents are also precluded from taking commissions on certain expense money paid to union members; commissions are limited on wages within 10% of scale pay; and agents must allow actors to terminate a representation contract if the agent is unsuccessful in procuring employment for the actor within a specified period of time." 622 F.2d at 648 [J.A. 334-35].

For the privilege of representing actors, agents are required to pay franchise fees to Equity. These fees are deposited by Equity in its general treasury and Equity makes no attempt to cost justify the amounts it charges as franchise fees. The franchise fees:

> ". . . are not segregated from other union funds. While the union argues that they are necessary to pay the union's expenses in administering the franchise system, no evidence was presented at trial to show that the union's costs justified the franchise fees." 622 F.2d at 651 [J.A. 349-50].

The basic restrictive elements of the above described system for the regulation of theatrical agents have been continuously in effect since 1928, when the Union unilaterally established a licensing or franchising system for the regulation of agents. [J.A. 49-50].

In the 1950's, discussions were held between the Union and TARA, as the bargaining representative for all agents, for the purpose of modifying the Union's unilateral agency regulations. As a result of the negotiations, agency regulations known as "Rule A" [Pl. Ex. 106, R. 43 (p. 162)] were promulgated, effective June 4, 1958. Equity required TARA members and other agents seeking to represent Equity members to become franchised by Equity, under Rule A. In or about 1975, TARA and Equity commenced discussions with respect to modifications of Rule A. [J.A. 59]. The negotiations had been commenced at the request of TARA due to the "economic plight" of the agents under Rule A. TARA described Rule A as "not permit[ting] franchised agents to earn back the cost of operating an efficient organization in New York, let alone make a profit." [Pl. Ex. 3, R. 45a (p. 785), J.A. 196].

TARA's "main demand" during the TARA-Equity negotiations was modification of the commission structure to allow agents to charge 10% on all wages received by an actor (including minimum or scale jobs) pursuant to the collective bargaining agreements between Equity and the producers. [J.A. 82-85, 123-25].

On January 6, 1977, after TARA and Equity had been unable to agree on new agency regulations, TARA "terminated" Rule A. [J.A. 60]. As a result, most or all TARA agents, and some other agents, became unfranchised and were not permitted to represent Equity members unless a pre-existing agency contract between the agent and the Equity member was still in force. [J.A. 60]. The TARA-Equity negotiations continued after Rule A had been terminated. [R. 43 (p. 246)]. Because of their dissatisfaction with the acquiescence of the TARA leadership to Equity during the negotiations, the Agents, by letter

dated August 31, 1977, advised the Union that they had resigned from TARA, stating:

> ". . . [we] cannot in good conscience accept the terms and proposals being negotiated by Equity and TARA." [Pl. Ex. 67, R. 43 (pp. 136, 165, 166), J.A. 207].

Thereafter, TARA and Equity reached agreement on new Equity Agency Regulations. These regulations were reduced to writing in October 1977. [Pl. Ex. 71, R. 44 (p. 380), J.A. 209]. Subsequently, most TARA agents who were franchised prior to January 7, 1977 became refranchised. [J.A. 62, R. 43 (p. 258)]. TARA's decision to approve the new Equity Agency Regulations, which bind all franchised agents, was made by a membership vote of approximately 10 to 5. At the time of the vote, there were only 20 members left in TARA. [R. 43 (p. 278), 45 (p. 747)]. TARA was coerced into accepting the new Equity Agency Regulations. As Howard Hausman, a William Morris talent agent and attorney and the head of the TARA negotiating committee, testified:

> "We all consider that Equity's point of view was indefensible, outrageous, horrible, wrong, simply because they were expecting agents to subsidize the lowest paid actors, somehow to work for them without any way of getting paid.
>
> We still all feel that way. We accepted a deal under which that was imposed on us. That is the way in which we accepted it." [J.A. 125-26].

The new Equity Agency Regulations, *inter alia,* prohibit commissions: on scale jobs, on chorus jobs, on rehearsal pay and on out-of-town expense money. *In fact, the new regulations eliminate those limited areas in which commissions on scale were previously allowed.* [Pl. Ex. 71, R. 44 (p.

380), J.A. 209]. Most of the Agents have remained unfranchised since January 6, 1977. [J.A. 63]. Because of continuing pressure brought by the Union upon the Agents and their actor-clients (Union members who employ petitioners), the petitioners commenced this action in May 1978.

C. Proceedings Below

The complaint and the Agents' motion for a preliminary injunction prohibiting the Union and its members from boycotting the Agents during the pendency of this action were filed on May 26, 1978. The District Court denied the motion for a preliminary injunction [Pet. App. D1]. The Court of Appeals, in a memorandum opinion, affirmed [Pet. App. C1]. The bench trial of the action commenced on June 21, 1979. On October 24, 1979, Judge Motley rendered her decision [Pet. App. B1] dismissing the complaint. On May 23, 1980, in an opinion written by Judge Lumbard [J.A. 332], the Court of Appeals affirmed.

Summary of Argument

The Union's franchising system violates the Sherman Act because:

> A. It constitutes a group boycott which totally prevents the Agents from serving as agents for actors and forecloses them from competing with Union-franchised agents. *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Klors, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959);
>
> B. Its regulation of agents' commissions constitutes both horizontal and vertical price fixing. *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); *Dr.*

Miles Medical Co. v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975);

C. It constitutes an agreement not to compete by horizontal competitors. *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939); *United States* v. *General Dyestuff Corp.*, 57 F.Supp. 642 (S.D.N.Y. 1944); *Duplan Corp.* v. *Deering Milliken, Inc.*, 444 F.Supp. 648, 683-684 (D.S.C. 1977), *aff'd. in part*, 594 F.2d 980 (4th Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980);

D. It permits the Union to use its legal monopoly over the services of actors to illegally monopolize the business of rendering agency services to actors. *See Packaged Programs, Inc.* v. *Westinghouse Broadcast Co.*, 255 F.2d 708, 710 (3rd Cir. 1958), and cases cited therein; and

E. The Union's activities are not protected by the labor exemption to the antitrust laws.

The labor exemption from the antitrust laws is discussed at length in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 621-623 (1975) ("*Connell*"). It consists of a non-statutory and a statutory exemption. The latter immunizes unilateral union action if that "action is in the union's self-interest in an area which is a proper subject of union concern". *Intercontinental Container Transport Corp.* v. *New York Shipping Association*, 426 F.2d 884, 887 (2d Cir. 1970). *See United States* v. *Hutcheson*, 312 U.S. 219 (1941).

"The 'statutory' exemption has its source in judicial readings of sections 6 and 20 of the Clayton Act, 15 U. S. C. §§ 17, 29 U. S. C. § 52, and of the Norris-LaGuardia Act, 29 U. S. C. §§ 105-115" 622 F.2d at 648 [J.A. 336].

The Courts below dismissed the petitioners' complaint on the ground that the Union's franchising system for theatrical agents was within the statutory exemption because the theatrical agents are part of the Union's labor group and because the franchising system furthers legitimate labor objectives. The lower Courts' rulings are predicated upon two crucial, erroneous holdings: (1) the franchising system protects Union wage scales, and (2) the franchising system eliminates wage competition between Union members.

Union regulation of agents has no bearing upon wage competition between Union members nor did the Union offer any evidence with respect to this issue. The holding that the Union franchising system operates to protect scale wages is a misconstruction of *Carroll.* In *Carroll* the booking agents for musicians were held to be part of the Union's labor group ***because the union did not have a collective bargaining agreement with the employers of its members.*** Accordingly, it was necessary for the Union to regulate the agents who directly paid Union members, in order to assure that Union members were paid the scale wages unilaterally mandated by the Union. *In addition, the court in Carroll specifically found that booking agents charged exorbitant commissions (i.e. in excess of 15%) and booked jobs for Union members at less than scale wages.* No such findings have or could be made in the instant case because: (1) the minimum wages payable to Equity members are determined by collective bargaining agreements between Equity and the producers who employ the members of Equity, (2) Equity members are paid *directly* by the producers, (3) the producers must post a bond guaranteeing such payments, and (4) all petitioners are regulated by state law as licensed employment agencies who cannot charge commissions in excess of ten percent. Under these circumstances, the agents may be able to affect the disposable income of their actor clients (just as, for example, landlords do), but the agents

cannot affect the minimum wages that producers must pay directly to Union members.

If this Court disagrees with the petitioners' interpretation of *Carroll*, it should overrule *Carroll* because the federal policy of fostering competition, which prohibits, as *per se* violations of the antitrust laws, the Union's group boycott, price fixing and agreements not to compete, far outweighs, in these circumstances, the conflicting federal labor policy which encourages collective bargaining and related Union activity. It should be noted in this regard that the complete elimination of the franchising system will in no way affect Equity's collective bargaining agreements with producers.

If this Court sustains the validity of the Union franchising system, it should nevertheless strike two of its most onerous provisions: (1) the prohibition of commissions on scale or minimum wage jobs, and (2) the requirement that agents must pay annual and initial fees to the Union for the privilege of being dominated and regulated by the Union. There is absolutely no justification or legitimate labor objective for the Union's requirement that agents must work for nothing when they obtain scale jobs (which can be as high as $600 per week) for Union members. While the Courts below attempted to rationalize the Union's need to regulate maximum commissions (which cannot exceed 10% under state law), no effort was made to explain why Union members need not pay any commissions when they accept various jobs obtained for them by agents. Similarly, the Courts below failed to explain how any legitimate labor objective is furthered by requiring agents to pay franchise fees to Equity. Such payments have no effect upon the minimum wages mandated by Equity's collective bargaining agreements and are illustrative of the Union's use of its monopoly power over 23,000 actors to exploit agents by

extracting Union subsidies from them. As the Court noted in *United States* v. *Griffith,* 334 U.S. 100, 108, (1948):

> "If monopoly power can be used to beget monopoly, the [Sherman] Act becomes a feeble instrument indeed."

POINT I

The *Carroll* Case Holding That Booking Agents for Musicians Are Part of a Union Labor Group Should Not Apply Here Because of the Peculiar Facts and Circumstances of the Club Date Music Industry, Which Operates *Without Collective Bargaining Agreements.*

In holding that Agents were part of the Union's labor group, the Courts below relied primarily on this Court's decision in *Carroll.* That reliance was error and improperly extended the *Carroll* holding, which applied only to musicians' booking agents in the unique club date field, to theatrical agents who operate under vastly different conditions. If this Court nevertheless finds that the lower Courts have properly interpreted *Carroll,* that decision should be overruled to the extent it applies to agents.

A. The Courts Below Improperly Interpreted and Extended This Court's Decision in Carroll.

The most unusual circumstance in *Carroll* which makes it so different from the subject case is the fact that *the union in Carroll, the American Federation of Musicians ("AFM"), did not have a collective bargaining agreement with the employers of its members* in the peculiar club date field. The conclusion of the District Court that "the Court's holding in *Carroll* was in no way limited to those instances where union members were not employed under collective bargaining agreements" (478 F.Supp. at 502) [Pet. App. B 7] is not borne out by the Supreme Court's

opinions. Thus, the Supreme Court stated: "The union practices questioned here are mainly those applied to 'club-date' engagements of union members" (391 U.S. at 102), and "There are no collective bargaining agreements in the club-date field" (*id.* at 104). In footnote 6 (*id.*) the Court noted that the distinction between the club-date engagements, which are not governed by collective bargaining agreements, and non-club-date engagements, which are, "is vital".[5]

The majority and dissenting opinions clearly demonstrate that the Supreme Court in *Carroll* was dealing with unilateral union practices involving club-date engagements that were not the subject of collective bargaining agreements, which would have rendered the union's minimum wage regulations and other unilateral practices superfluous. Justice White began his dissenting opinion by stating, "In my view the Court is misled by the peculiar role of bandleaders and the *peculiar economics of the club-date industry* . . . ." 391 U.S. at 114 (emphasis supplied). In concluding, Justice White noted, "By combining with a nonlabor group, the musicians union has obtained effective control of the entire club-date industry." *Id.* at 121. The majority opinion noted that "Club-date engagements are rigidly regulated by unilaterally adopted union bylaws and regulations." *Id.* at 104. These by-laws and regulations were the subject of the plaintiffs' antitrust claims.

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[5] Similarly, the District Court in *Carroll* held:

"The defendant unions do not bargain collectively either with orchestra leaders or purchasers of music in the club date single engagement field." *Carroll* v. *American Federation of Musicians,* 241 F.Supp. 865, 891 (S.D.N.Y. 1965).

"Plaintiffs claim that they represent a class of orchestra leaders largely engaged in the single engagement field who (a) are employers who regularly employ sidemen or employee musicians who are members of AFM, Local 802, or another Local affiliated with AFM; and (b) are independent contractors largely engaged in the single engagement field." 241 F.Supp. at 884.

In areas other than the club date field, the subjects of the by-laws and regulations were largely dealt with in collective bargaining agreements between the AFM and employers. Thus, for example, where AFM had a collective bargaining agreement with the three television networks, that agreement determined the minimum wage union sideman would be paid by the networks. 241 F.Supp. at 873. Consequently, AFM did not unilaterally impose minimum wage requirements upon orchestra leaders as it did in the club-date field which lacked collective bargaining agreements.

There were no collective bargaining agreements in the club date music industry because of the peculiar nature of the diverse employers who employed club date musicians sporadically, sometimes only once in a lifetime and generally for non-commercial purposes, *e.g.* the father of the bride. This is a truly unique situation since the "primary purpose" of a union is to "bargain collectively with their employers for its members". Statement of Senator Cummins during the Senate debate with respect to Section 6 of the Clayton Act, quoted in *Cordova* v. *Bache & Co.*, 321 F.Supp. 600, 612 (S.D.N.Y. 1970). This should be contrasted with the case at bar where the employers (theatrical producers) have formed associations for the sole purpose of negotiating collective bargaining agreements with Equity. Thus, unlike AFM, Equity has collective bargaining agreements with all producers who employ its members.

The uniqueness and the peculiar facts of *Carroll* have not escaped the attention of commentators [6] or the courts. In

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[6] *E.g.*, Bartosic, *The Supreme Court, 1974 Term*, 62 Va. L. Rev. 533, 593, n. 270 (1976); *Labor Law-Antitrust Liability of Labor Unions*, 15 B.C. Ind. Comm. L. Rev. 595, 606 (1974) ("it has been suggested that the holding in *Carroll* may be limited to the special employment conditions of the music industry"); DiCola, *Labor Antitrust: Pennington, Jewel Tea and Subsequent Meandering*, 33 U. Pitt. L. Rev. 705, 747 (1972); Leslie, *Principles of Labor Antitrust*, 66 Va. L. Rev. 1183, 1216, n. 113 (1980) ("The holding in *Carroll* appears to have been at least partially dependent on the peculiar nature of the club-date music industry, . . . but it is a disturbing precedent nonetheless.").

Home Box Office, Inc. v. *Directors Guild of America, Inc.*, 83 F.R.D. 423, 425 (S.D.N.Y. 1979), the court, commenting upon defendants' reliance upon *Carroll,* noted:

> "But *American Federation of Musicians* v. *Carroll,* 391 U.S. 99 . . . (1968), cannot confidently be read so broadly, given its special circumstances, especially the fact that the orchestra leaders there actually played as musicians with their dance bands. Furthermore, this Court, at least, lacks the confidence to apply a decision as unique and difficult as *Carroll* without the benefit of a full record, as Judge Levet insisted on having in *Carroll* itself."

At best, *Carroll* dealt only tangentially with the issue of union regulation of agents. In *Carroll,* the four plaintiffs were orchestra leaders and musicians who were members of AFM while competing with and hiring union member-musicians. Two of the four *Carroll* plaintiffs were also agents, but only to the limited extent that they booked jobs for their own orchestras. Accordingly, the primary issue and the focus in *Carroll* was plaintiffs' activities as orchestra leaders (and not as booking agents) and the union's fixing the minimum prices ("price floors") the orchestra leaders could charge their customers. This is demonstrated by the Supreme Court's delineation of the issues in *Carroll*:

> "The question is whether union practices of the petitioners *affecting orchestra leaders* violate the Sherman Act as activities in combination with a 'non-labor' group, or are exempted by the Norris-LaGuardia Act as activities affecting a 'labor' group which is a party to a 'labor dispute'. " 391 U.S. at 101 (emphasis supplied).
>
> "The critical inquiry is whether the price floors in actuality operate to protect the wages [of union members]." 391 U.S. at 108.

In its opinion below, the Court of Appeals recognized that "the central holding" in *Carroll* "was that the fact that bandleaders sometimes performed as musicians meant that such [union] restrictions were valid. . . ." 622 F.2d at 650 [J.A. 344].

Despite the peripheral involvement of agents in *Carroll,* that decision has been indiscriminately extended to cases [7] which involved full time professional independent agents, a factual situation never considered in *Carroll.*

In *Carroll* the Supreme Court approved the District Court's holding that the orchestra leader plaintiffs were parties to a "labor dispute" and were a "labor group" because of the "presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors." 391 U.S. at 106. The District Court in *Carroll* held that the plaintiffs, *as orchestra leaders,* were members of the AFM's labor group because:

> "[T]he plaintiff orchestra leaders are in competition with employee members of the defendant unions regarding jobs, wages and other working conditions. As a result they comprise a labor group in these fields." 241 F.Supp. at 887-88.

Here the Agents are clearly not in competition with their Union member-clients regarding jobs, wages or other working conditions. Accordingly, the express basis upon which the *Carroll* plaintiffs were found to be a part of the AFM labor group is wholly absent here. The District Court went on to hold that the two *Carroll* plaintiffs who performed as booking agents *were not, in that capacity, part of the AFM's labor group:*

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[7] *See, e.g., Adams, Ray & Rosenberg* v. *William Morris Agency,* 411 F.Supp. 403 (C.D. Cal. 1976); and *Redfield* v. *American Federation of Musicians,* No. 78-7530 (2d Cir. Mar. 1, 1979).

> "Since their expulsion from the defendant unions, Carroll and Peterson have not personally led or played at their engagements. *They merely book and organize them. In this capacity they do not compete with sidemen or subleaders and the basis of the conclusion that they are a labor group falls.*" 241 F.Supp. at 890 (emphasis supplied).

Although the impact of AFM's licensing of agents, other than as it applied incidentally to plaintiffs as orchestra leaders, was not before the Court,[8] the District Court proceeded to rule on this subject. The District Court, recognizing that the "economic interrelationship" between booking agents (who are independent businessmen who obtain jobs for union members) and union members was a novel area, stated:

> "Booking agents are independent contractors not in job or direct wage competition with members of the defendant unions. Apparently, no court has had to decide the question of whether a group of independent contractors performing different functions than a union's members and not in competition with union members for jobs may be subjected to union regulations consistent with the antitrust laws." (241 F.Supp. at 892),

and then concluded:

> "Because the activities of the booking agents *here* have and had a direct and substantial effect on the wages of the members of defendants, I find that they are in an economic interrelationship with the members of defendants such that the defendants are

[8] In *Carroll*, unlike the case at bar, the plaintiffs were *not* boycotted by the union in their capacity as booking agents (but were as orchestra leaders and musicians). 391 U.S. at 103, fn. 5.

> justified in regulating their activities without contravening the Sherman Act. *Furthermore, I find the regulations to be reasonably related to their interest in maintaining observance of union scale wages and working conditions.*" 241 F.Supp. at 893 (emphasis supplied).

The conclusions that there was an "economic interrelationship" between the members of AFM and its booking agents and that there was a reasonable relationship between the licensing of agents and AFM's "interest in maintaining observance of union scale wages and working conditions" were predicated upon the following findings of fact, *none of which are present in the instant case:*

1. In *Carroll* the AFM did not have a collective bargaining agreement with the employers (*e.g.*, the father of the bride) who hired its members. Accordingly, if AFM were to enforce its unilaterally imposed minimum wage scales, it had to do so through its members and through direct vertical regulation of the booking agents who pay union members. Here, where the Union has entered into collective bargaining agreements with the employers (producers) who directly pay Union members, there is no such need or justification.

2. In *Carroll,* where there was no collective bargaining agreement between the union and the employers, this Court held that AFM's fixing the minimum prices which orchestra leaders could charge was justified by a specific "finding that the requirement is necessary to assure that scale wages will be paid to the sidemen and the leader." 391 U.S. at 112.

> "There was evidence that when the leader does not collect from the purchaser of the music [employer] an amount sufficient to make up the total of his

> out-of-pocket expenses, including the sum of his wage-scale wages and the scale wages of the sidemen, he will, in fact, not pay the sidemen the prescribed scale." *Id.* at 111.

In stark contrast, the Courts below could not, and indeed did not, find that Union members were not paid scale wages or were in danger of not being paid scale wages. There was undisputed evidence that:

> A. Producers must pay scale wages to Union members pursuant to collective bargaining agreements between the Union and producers [Pl. Ex. 106, R. 43 (p. 162)];
>
> B. Producers must post a bond guaranteeing the payment of scale wages to Union members [Pl. Ex. 114, R. 44 (p. 380)]; and
>
> C. Unlike *Carroll,* where the employer paid the booking agents who in turn paid the Union members, *here the producers pay the actors directly.* [J.A. 150-151]. Despite Union allegations that actors need protection from their agents, *there is no evidence that any Union member who used an agent was ever paid less than scale or minimum.*

In view of the above, the District Court's finding that "the regulations imposed by Actors' Equity upon its members are without doubt designed to protect union wage scales" (478 F.Supp. at 502) [Pet. App. B 7] is without substantiation and is clearly erroneous.

3. In *Carroll* there was a specific finding:

> "that the booking agent regulations were adopted because of experience that 'many booking agents [A] charged exorbitant fees to members and [B] booked engagements for musicians at wages which were below union scale'." 391 U.S. at 113.

Again for the reasons noted in "2" above, the Courts below did not find that the petitioners or other agents "booked engagements for" Union members "at wages which were below union scale". Similarly, the Courts below did not find that "many" theatrical agents (or even one) "charged exorbitant fees to" Union members[9] because there is no evidence that:

> A. Any petitioner or any other agent charged an exorbitant commission[10] to any Union member or anyone else; or
>
> B. Any Agent charged a Union member a commission in excess of the 10% commission permitted by Article 11 of the General Business Law.

Because of the above, the Court of Appeals holding that the regulation of theatrical agents is justified by the "*possibility* that job-hungry actors will work through agents who take excessive commissions" (622 F.2d at 651) [J.A. 348-49] (emphasis supplied) can only be characterized as unsubstantiated and speculative and, therefore, is clearly erroneous.

4. In *Carroll* there was no evidence that the booking agents were licensed or regulated by any government

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[9] The Second Circuit in *Redfield* v. *American Federation of Musicians*, No. 78-7530 (Mar. 1, 1979), was faced with a case identical to *Carroll* except that the plaintiff booking agent was not a member of the AFM. The Court justified its application of *Carroll* to *Redfield* by holding:

> "the purpose of the restrictions is aimed at protecting the musicians from booking agents who may charge exorbitant fees or contract for work at lower than going rates."

For the reasons noted above, the Union's restrictions here cannot be justified on the grounds that they are necessary to protect Union members from agents who charge "exorbitant fees" or contract for work at "lower than going rates".

[10] Since the booking agents were allowed to charge 15% commissions in *Carroll* (241F.Supp. at 881), by using the term "exorbitant" the Court was obviously referring to commissions in excess of 15%.

agency. Here, the agents all operate in New York City and, as the District Court found, they are:

> "... required to be licensed as employment agencies and are regulated by the Department of Consumer Affairs of New York City pursuant to article 11 of the General Business Law of the State of New York, which sets the maximum commissions employment agencies may charge and has specific provisions dealing with theatrical agents." 478 F.Supp. at 497 [Pet. App. B 2].

Accordingly, the District Court's holding in *Carroll* as to the licensing of booking agents by AFM and the booking agents' "economic interrelationships" with AFM was based upon facts which are not present in this case. Those facts established a legitimate labor objective or justification for the AFM's regulation of booking agents—*i.e.,* the protection of musician's scale wages in the absence of a collective bargaining agreement which normally supplies such protection. The conclusion by the Court of Appeals here that theatrical agents "must be considered a 'labor group' because the union cannot eliminate wage competition among its members without regulation of the fees of the agents." (622 F.2d at 651) [J.A. 348], totally ignores the effect of the lack of a collective bargaining agreement in *Carroll.* Moreover, this conclusion is not substantiated by the record. There is no evidence that absent its franchising system Equity would be unable to "eliminate wage competition among its members."

The District Court in *Carroll* did not define what it meant by an "economic interrelationship"[11] between a union

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[11] The narrowness of the term "economic interrelationship" is best illustrated by *Los Angeles Meat and Provision Drivers Union* v. *United States,* 371 U.S. 94 (1962), the Supreme Court decision which first used that term in the phrase *"any actual or potential wage or job competition, or of any other economic interrelationship,*

and another group. However, such a relationship obviously cannot include those numerous groups of persons who merely supply products and services to union members but do not affect the actors' wages, hours or working conditions, such as: landlords who charge rent, actors' studios which charge fees, photographers who charge fees, grocery stores who sell food, transportation companies which take actors to their destination, accountants and lawyers who charge fees, or agents who charge fees. If it were otherwise, unions would be permitted to fix the prices and regulate the activities of the foregoing groups (of which *only* the agents' fees are regulated by the state) with immunity from the antitrust laws simply because their activities affect actors' disposable income.

In responding to this argument, the District Court held:

> "Unlike theatre ticket prices, photographers' fees, commuting costs, or grocery prices, commissions are directly and proportionately related to wages." 478 F.Supp. at 504 [Pet. App. B. 9].

Petitioners submit that the commissions an actor pays an agent cannot be distinguished from the other expenses an actor incurs which affect his disposable income on the ground that "commissions are directly and proportionately related to wages." A factor which significantly affects the

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between the grease peddlers and the other members of the union." *Id.* at 98 (emphasis supplied). In that case it was held that "grease peddlers", independent businessmen who purchased restaurant grease and then sold and delivered the grease to processors, were *not* in a wage or job competition or other economic interrelationship with the members of a union composed of processors' employees who picked up the grease at restaurants and then delivered it to the processors. If, in the Supreme Court's view, the grease peddlers who performed the same functions as Union members were not in an economic interrelationship with the Union members, the agents here are clearly not in an economic interrelationship with the members of Equity. *See also United States* v. *Fish Smokers Trade Council,* 183 F.Supp. 227 (S.D.N.Y. 1960).

amount of an actor's wages and is directly related to such wages is the price a producer charges for admission to his play because the more money a producer grosses the more he will be able to pay his actors. Nevertheless, neither an actor nor his union can, under the antitrust laws, regulate the producer's ticket prices. In *United Mine Workers of America* v. *Pennington,* 381 U.S. 657, 663 (1965), the Supreme Court stated:

> "If the UMW in this case, in order to protect its wage scale by maintaining employer income, had presented a set of prices at which the mine operators would be required to sell their coal, the union and the employers who happened to agree could not succesfully defend this contract provision if it were challenged under the antitrust laws by the United States or by some party injured by the arrangement."

The significance of a collective bargaining agreement to the determination of a union's labor exemption from the antitrust laws is highlighted by a comparison of this Court's decisions in *Carroll* and *Pennington.* In *Pennington,* where the parties had a collective bargaining agreement, the Court, as noted above, indicated that a union's efforts to protect its members' wage scales by setting the price employers charged their customers would violate the antitrust laws. On the other hand, in *Carroll,* where there was no collective bargaining agreement, the Supreme Court specifically held that the union could fix the minimum prices orchestra leaders charge their customers so as to protect its members' wage scales without violating the antitrust laws.

This significance is also demonstrated by this Court's decision in *Connell* and the recent opinion of the Ninth Circuit in *California State Council of Carpenters* v. *Associ-*

ated General Contractors of California, Inc., 1980-81 Trade Cas. (CCH) ¶ 63,663 (1980). In the latter opinion the Court of Appeals noted that:

> "*Connell* held that a union could be liable under the antitrust laws for coercing a 'stranger' employer, i. e., *one with whom the union had no collective bargaining relationship,* to agree not to use nonunion subcontractors" (*id.* at 77,555) (emphasis supplied),

and went on to hold that the statutory exemption did not apply to defendants who sought to coerce general contractors and others

> ". . . with whom the Union had *no collective bargaining relationship,* to hire only construction firms, primarily subcontractors, who had not signed with the Unions" (*id.* at 77,556) (emphasis supplied).

See also Larry V. Muko, Inc. v. *Southwestern Pennsylvania Building and Construction Trades Council,* 609 F.2d 1368, 1373 (3rd Cir. 1979). These cases stand for the proposition that unions which attempt to impose restraints upon persons who do not employ union members (and therefore never have collective bargaining agreements with such unions) are not protected by the nonstatutory exemption.

We have dealt at some length with the District Court opinion in *Carroll* because the long majority opinion of this Court in *Carroll* devotes only one paragraph to the AFM's regulation of booking agents. 391 U.S. at 113. In that paragraph the majority refers to "Oliver II"[12] and adopts with favor the District Court's factual justification (*i.e.*, finding of a legitimate labor objective) for the AFM's regulation of booking agents—to wit, booking agents (operating in the absence of a collective bargaining

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[12] *Teamsters Union* v. *Oliver,* 362 U.S. 605 (1960).

agreement and state regulation) charged exorbitant fees and booked jobs at less than the scale wages unilaterally mandated by the AFM. As previously noted, these factual findings are totally inapplicable to the case at bar where Equity members' scale wages are set by a collective bargaining agreement, Equity members receive their wages directly from the producers (and then pay commissions to an agent, if appropriate), and agents' commissions are regulated by state law. Under these circumstances, no legitimate labor objective is furthered by Equity's regulation of theatrical agents.

B. If This Court Interprets *Carroll* To Hold That Theatrical Agents Are Part of Equity's Labor Group—*Carroll* as Applied to Agents Should Be Overruled.

No one can dispute the existence of a "delicate and difficult area of conflict"[13] between our federal antitrust laws which foster competition and our federal labor laws which limit competition. Similarly indisputable is the fact that this Court and other "Courts have struggled for decades to resolve the clash between the procompetitive purposes of the antitrust laws and the anticompetitive impact of the labor laws." *Consolidated Express: Antitrust Liability for Illegal Labor Activities,* 80 Columbia Law Review 644 (April 1980). In *Jou-Jou Designs Inc.* v. *ILGWU,* 490 F.Supp. 1376, 1382 (S.D.N.Y. 1980), the Court recently noted:

> "We are thus confronted, as many courts have been, with the interaction of antitrust policy and labor policy, expressed in statutes and Supreme Court decisions. The accommodation between these policies, characterized by one commentator as 'intrinsically incompatible,' presents 'a troublesome and unruly

[13] Dissenting opinion of Justice White in *Carroll,* 391 U.S. at 114.

> issue.' *Commerce Tankers* v. *National Maritime Union of America,* 553 F.2d 793, 801 (2d Cir. 1977), quoting Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws,* 32 U. Chi. L. Rev. 659 (1965)."

Labor's statutory exemption from the antitrust laws reflects Congress' desire to reconcile the clash between conflicting federal antitrust and labor policies (*Allen Bradley Co.* v. *Local 3, IBEW,* 325 U.S. 797, 806 (1945)) while limiting the statutory exemption to unilateral union activity which strengthens a union's ability to bargain collectively. As the Court in *Associated General Contractors, supra,* at 77,557, held:

> "The statutory exemptions from the antitrust laws found in the Clayton and Norris-LaGuardia Acts were, however, 'designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining'. *Brotherhood of Railroad Trainmen* v. *Chicago River and Indiana Railroad,* 353 U.S. 30, 40, 77 S.Ct. 635, 640 (1957). *See, also, Cordova* v. *Bache & Co.,* 321 F.Supp. 600, 605-06 (S.D.N.Y. 1970)."

See also Larry V. Muko, Inc. v. *Southwestern Pennsylvania Building and Construction Trades Council,* 1978-2 Trade Cas. (CCH) ¶ 62,184 at 75,295 (3d Cir. 1978), where the Court held that the "statutory exemption" expresses "a national labor policy in favor of the freedom of employees to organize." In *Carroll* this Court tipped the delicate balance between the conflicting labor and antitrust policies in favor of labor by extending the definition of a labor group to include persons such as booking agents who were not in a job or wage competition with union members. Prior to *Carroll,* no Court had ever held that persons

who are not union members, who do not compete with union members for jobs and who perform different functions from union members—are nevertheless part of a union labor group. *See* the District Court decision in *Carroll,* 241 F.Supp. at 892. Petitioners submit that this Court in *Carroll* extended the definition of a labor group solely because there was no collective bargaining agreement to protect minimum wages of union members and that, were it not for the economic interrelationship between wages and booking agents which exists only in the absence of a collective bargaining agreement (and state regulation of agents), *Carroll* would have been differently decided.

If this Court, nevertheless, disagrees with petitioners' contention that *Carroll* was intended to be limited to its particular facts,[14] it should overrule *Carroll* because union regulation of agents, at least in the presence of collective bargaining agreements and state regulation of agents, does not further any legitimate labor objective. For the reasons previously noted, theatrical agents such as petitioners have no impact upon the minimum wages paid to Union members which are covered in comprehensive collective bargaining agreements between the Union and bonded producers. If the decisions below are allowed to stand, the delicate balance between conflicting federal labor and antitrust policies will be upset without benefitting labor while at the same time retarding the important antitrust policy of free competition which is the foundation of this Court's decisions that group boycotts, price fixing and agreements not to compete are illegal *per se. See*

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[14] In his dissent in *Carroll,* Justice White stated:

> "It may be that the Court views this industry as having special problems of supply and demand requiring special treatment under the antitrust laws. If this is the case, the Court should frankly say so and seek to confine the misguided rules of law it announces." 391 U.S. at 121.

Radiant Burners, Inc. v. *Peoples Gas Light & Coke Co., supra; Albrecht* v. *Herald Co., supra; Goldfarb* v. *Virginia State Bar, supra; Interstate Circuit, Inc.* v. *United States, supra; Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1 (1958).

In this regard, it should be noted that in most cases involving conflicts between federal labor and antitrust policies the courts are concerned with the "congressional policy favoring collective bargaining" (*see, e.g., Connell* at 626; *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676 (1965)), a concern which is not present here. If Equity is precluded from franchising agents, its collective bargaining agreements with producers will not be affected, the wages and working conditions of its members will not be affected, and the policies of economic freedom which support the antitrust laws will be furthered.

POINT II

There is No Justification for the Union's Prohibition of Commissions on Scale Jobs.

If this Court were to affirm that portion of the opinions below which justify the "regulation of the fees of agents" on the ground that "the union cannot eliminate wage competition among its members without" such regulation (622 F.2d at 651) [J.A. 348], it should nevertheless hold that the regulation of maximum fees does not permit unions to require agents to render their services to union members for nothing on scale or minimum or any other jobs. No citation is required for the proposition that the power to tax is the power to destroy. Agents are forced to work for nothing when they obtain a scale job for a client even

though they sought a higher wage for the client in negotiations with the producer. In view of agents' self-interest in obtaining the highest possible wages for actor-clients, there can be no justification for the Union's prohibition of commissions on scale jobs.

Despite the above language of the Court of Appeals, there is no evidence to support a finding that a prohibition of commissions on scale jobs, as opposed to Union regulation of maximum commissions, helps the Union "eliminate wage competition among its members" or furthers any other legitimate labor objective.

Moreover, agents' commissions are regulated by Article 11 of the General Business Law and there is no evidence that agents collect commissions which violate Article 11. Accordingly, no justification has been shown to substitute the Union's desire to impose onerous and self-serving restrictions on agents' commission for the wisdom of the New York State Legislature in permitting theatrical agents to charge a ten percent commission under Article 11 of the General Business Law.

If the Courts below are upheld, the Union might, and could lawfully the day after this Court's decision, require agents to work for no commission on jobs which pay $1000 a week or more. Where, as here, agents are forced to work for nothing, the Union is not furthering a legitimate labor objective but instead is requiring agents to subsidize Union members.

POINT III

There Is No Justification for the Union's Requirement That Franchised Agents Must Pay Franchise Fees for the Privilege of Being Regulated and Dominated by Equity.

Not content with regulating the commissions that agents charge Union members and with regulating the manner in which agents may operate their businesses, the Union requires agents to pay franchise fees for the privilege of being regulated, dominated and required to work for nothing. *No court, not even Carroll, prior to the decisions of the Courts below, has ever held that a union may extract franchise fees from independent agents who represent union members.* In *Carroll,* the Union did not extract franchise fees from the agents it regulated. 241 F.Supp. at 881.

The Court of Appeals, while recognizing that franchise fees is a "troublesome" area, appears to have assumed without explanation that the Union may impose upon agents the "union's expenses in administering the franchise system" it forces upon unwilling agents. 622 F.2d at 651 [J.A. 349-50].

Although the Court of Appeals found that "no evidence was presented at trial to show that the union's costs justified the franchise fees" and that:

> "Clearly the union could not, legally, exact more from the agents than it needs to offset the costs of the franchising system. Such exactions would be unconnected with any of the goals of national labor policy[15] which justify the antitrust exemption for labor" (*id.*),

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[15] The Court of Appeals previously stated:

"The goal of the agent restrictions is the elimination of wage competition, traditionally one of the most sacrosanct goals of national labor policy." 622 F.2d at 651 [J.A. 349].

However, the Court of Appeals did not explain how the Union requirement that agents pay franchise fees in any way assists the Union in eliminating wage competition amongst its members.

it nevertheless refused to reverse the District Court on this issue because of assumptions which are not supported by the record.

Judge Motley did not cite any evidence or reasoning to support her "opinion that the franchise fees are reasonably related to the operation of the franchise system and the system's protection of wage scales and working conditions." 478 F.Supp. at 504 [Pet. App. B9]. The Union's requirement that agents must pay a franchise fee in order to represent actor-members of the Union on the Union's terms and conditions does not constitute protection of wage scales —but again amounts to the agents' forced subsidization of Union members. The more franchise fees extracted from agents, the less dues Union members must pay to Equity. If Equity (like the AFM in *Carroll*) did not charge any franchise fees, the wage scales Equity negotiates with producers for the benefits of Equity's members would remain unchanged. In short, the Union's requirement that agents pay franchise fees to the Union is an illustration of the Union's extension of its legal monopoly power over Union members to illegally extract fees from independent agents. *See United States* v. *Griffith, supra; Packaged Programs, Inc.* v. *Westinghouse Broadcast Co., supra.*

Conclusion

Petitioners request that the decisions of the Courts below be reversed and that this Court: (1) hold that theatrical agents are not part of Equity's labor group (or in any event that the franchise fee and no commission on scale job provisions of Equity's franchising system are not protected by the statutory labor exemption), (2) rule on the issue of whether the Equity franchising regulations (if not protected by the statutory exemption) are illegal *per se* and

not protected by the nonstatutory exemption,[16] and (3) remand this case to the District Court for the issuance of appropriate injunctive relief. Although the Courts below did not reach issue (2), "it was fully aired before the District Court" and "it involves the application of settled legal principles to uncontroversial facts." Accordingly, this Court has discretion to decide this issue *de novo* without remanding the case to the District Court for rulings thereon. *New York City Transit Authority* v. *Beazer,* 440 U.S. 568, 583 (1978).

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[16] Little argument is required to establish that: (1) Equity's activities, *i.e.*, price fixing, group boycott, agreement not to compete, are illegal *per se* absent the statutory exemption (*see* the cases cited at pages 10 and 11 above, and *Allen Bradley Co.* v. *Local 3, IBEW,* 325 U.S. 797 (1945)); (2) the nonstatutory exemption does not apply here. As stated by the Court of Appeals in *Associated General Contractors, supra,* at 77,560:

> "It is apparent from the discussion in *Connell* that the nonstatutory exemption may be invoked only in cases involving agreements between unions and employers on wages or working conditions."